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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 603

JOHN C. CURRY, individually and as Commissioner of Revenue of the State of Alabama, Petitioner,

versus

UNITED STATES OF AMERICA and DUNN CONSTRUCTION COMPANY, INC. and JOHN H. HODGSON & COMPANY, partners, doing business as DUNN CONSTRUCTION COMPANY, INC. AND JOHN H. HODGSON & COMPANY.

In re: John C. Curry, Individually and As Commissioner of Revenue of the State of Alabama, Applying for Writ of Certiorari to the Supreme Court of Alabama.

BRIEF OF AMICI CURIAE FOR THE STATE OF LOUISIANA.

EUGENE STANLEY,
Attorney General of the State of Louisiana;

CICERO C. SESSIONS,
Special Assistant Attorney General of the State of Louisiana;

AMICI CURIAE.

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May It Please the Court:

STATEMENT.

The State of Louisiana has an interest herein due to the pendency in the Supreme Court of Louisiana of "Standard Oil Company of Louisiana v. Rufus W. Fontenot, Director of Revenue, State of Louisiana, United States of America, Intervener," wherein contracts similar to those

in the case of bar are involved with reference to sales of refined petroleum products including gasoline to "cost-plus-a-fixed-fee" contractors.

The only distinction in the issues involved is that the Louisiana taxes are excise taxes laid on the dealers for their privilege in engaging in the business, *(Trinityfarm Construction Company v. Grosjean*, 291 U. S. 466), whereas, in the case at bar the gasoline taxes are in the nature of sales or use taxes, the incidence of which is upon the purchaser or consumer.

SUMMARY OF ARGUMENT.

I.

Entire contract must be construed to determine status of "cost-plus-a-fixed-fee" contract as agent of the United States or as independent contractor. *United States v. A. Bentley & Sons Company*, 293 Fed. 229, affirmed 16th Fed. 2nd. 895; *Dayton Airplane Company v. United States*, 21 Fed. 2nd. 673; *United States v. Newport News Shipbuilding & Dry Dock Company*, 178 Fed. 194; *Scully v. United States*, 197 Fed. 327; *Lynch v. United States*, 292 U. S. 571; *Insurance Company v. Wright*, 68 U. S. 456; *Noonan v. Bradley*, 76 U. S. 393.

II.

"Cost-plus-a-fixed-fee" contractor is not an agent or instrumentality of the United States. *Morgan v. Smith*, 159 Mass. 570; 35 N. E. 101; *Whitney Starrette & Co. v. O'Rourke*, 172 Ill. 177; 50 N. E. 242; *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148; 165 N. W. 816;

Baumann v. West Allis, 187 Wis. 506; 204 N. W. 907; *J. W. McCrary Engineering Company v. White Coal Power Company*, 35 Fed. 2nd. 142; *Crown City Lodge I. O. O. F. v. Industrial Accident Commission*, 52 Pac. 2nd. 143 (Cal. Appeals); *Allen v. Republic Building Company*, 84 S. W. 2nd. 506 (Texas Civil Appeals); *Standard Oil Company v. Lee*, 159 So. 325 (Supreme Court of Florida); *Six Cos. Inc. v. DeVinney*, 2nd. Fed. Sup. 693; *Boeing Airplane Co., et al., v. State Commissioner of Review and Taxation, et al.*, 113 Pac. 2nd. 110 (Supreme Court of Kansas); *Buckstaff Bathhouse Company v. McKinley*, 308 U. S. 358; cf. *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17; *Graves v. People of New York, ex rel O'Keefe*, 306 U. S. 466; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375; *James v. Dravo Contracting Company*, 302 U. S. 134; *Silas Mason & Company, Inc. v. Tax Commission of Washington*, 302 U. S. 186; *Fidelity & Deposit Company v. Pa.*, 240 U. S. 319; *Trinityfarm Construction Company v. Grosjean*, 291 U. S. 466.

III.

Assessment of taxes on sales of gasoline to "cost-plus-a-fixed-fee" contractors is not an unconstitutional burden on the United States. *Educational Films Corporation of America v. Ward*, 282 U. S. 379; *Panhandle Oil Company v. State of Mississippi, ex rel Knox*, 277 U. S. 18; *Graves v. Texas Company*, 298 U. S. 393; *Graves v. People of the State of New York, ex rel O'Keefe, supra; Trinityfarm Construction Company v. Grosjean, supra; James v. Dravo Contracting Company, supra; Silas Mason Company, Inc. v. Tax Commission of Washington, supra.*

IV.

Attempt to extend the benefits of the doctrine of inter-governmental immunity from taxation to profit contractors is in violation of the reserved constitutional rights of the States to lay non-discriminatory taxes. *Railroad Company v. Peniston*, 18 Wall. 5; *A. L. A. Schechter Poultry Corp. v. U. S.*, 295 U. S. 945.

ARGUMENT.

I.

ENTIRE CONTRACT MUST BE CONSTRUED TO DETERMINE STATUS OF "COST-PLUS-A-FIXED-FEE" CONTRACTOR AS AGENT OF THE UNITED STATES OR AS INDEPENDENT CONTRACTOR.

The contract in the case at bar is a government form prepared by the Government and embracing the terms, clauses, and provisions that the Government wanted. The contract should be taken and construed as a whole to determine the status of the contractor thereunder as an independent contractor or as an agent or instrumentality of the United States. If there is any ambiguity in the contract it is a fundamental rule that the contracts of the Government itself are to be more strongly construed against the Government. *United States v. A. Bentley & Sons Company*, 293 Fed. 229, affirmed 16th Fed. 2nd. 895.

Insofar as the Government may have contractually obligated itself to assume the payment of the taxes in question, sound public policy requires that the Government keep

its contracts the same as an individual must. *Dayton Airplane Company v. United States*, 21 Fed. 2nd. 673.

It is, indeed, a strange interpretation of the law of principal and agent which would permit the United States, purely as a matter of its own convenience, to assert that for some purposes under the "cost-plus-a-fixed-fee" contract, the contractor is an agent of the Government and, yet, for other purposes under the contract, the contractor is an independent contractor. We suggest that the proper view to take is that the contract as a whole must determine the status of the parties and that if a strict construction is applied thereto against the Government *(U. S. v. Newport News Shipbuilding & Dry Dock Company*, 178 Fed. 194; *Scully v. U. S.*, 197 Fed. 327; *Lynch v. U. S.*, 292 U. S. 571; *Insurance Company v. Wright*, 68 U. S. 456; *Noonan v. Bradley*, 76 U. S. 393), it will be clearly seen that the intention of the Government was to have work done and services furnished by independent contractors. This will be clearly demonstrated by the specific provisions of the contract itself, particularly with respect to the restrictions on the power of the contractor to bind the United States in the acquisition and purchase of supplies, etc.

II.

"COST-PLUS-A-FIXED-FEE" CONTRACTOR IS NOT AN AGENT OR INSTRUMENTALITY OF THE UNITED STATES.

There is nothing new in the use of "cost-plus-a-fixed-fee" contracts in the accomplishment of public works by the Government. It was clearly not intended in the enact-

ment of the Military Appropriations Act, 1941, Public, No. 611, 76th Congress, Third Session, c. 343, and the Act of July 2, 1940, No. 703, 76th Congress, Third Session, c. 508, that there be anything done or authorized to be done by a change in the method of compensation of the contractor under "cost-plus-a-fixed-fee" contracts, the nature of the duties to be performed by him is not changed, nor does it appear to be intended to make him an employee or agent where under a "cost-plus-a-fixed-percentage-of-cost" contract he was an independent contractor. In truth, all that was really accomplished by the legislation was a revision of the method of computation of the compensation of the contractors to avoid repetition of the exorbitant costs and expenses experienced by the Government under other types of contracts.

Under similar contracts, not necessarily, however, involving the United States as a party thereto, the weight of authority appears to be that the contractor is independent. *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Whitney Starrette & Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148, 165 N. W. 816; *Baumann v. West Allis*, 187 Wis. 506, 204 N. W. 907; *J. D. McCrary Engineering Co. v. White Coal Power Company*, 35 Fed. 2nd. 142; *Crown City Lodge I. O. O. F. v. Industrial Accident Commission*, 52 Pac. 2nd. 143 (Cal. Appeals); *Allen v. Republic Building Co.*, 84 S. W. 2nd. 506 (Texas Civil Appeals).

Under an almost identical contract involving similar sales of gasoline under a similar statute, it has been held that the contractor is independent and is not an agent of

the United States. *Standard Oil Company v. Lee*, 199 So. 325 (Supreme Court of Florida). We suggest that there is no substantial difference either in the general nature of the contract entered into or in the general nature and the work to be performed as involved in the case at bar and other cases involving similar contracts. In truth, all that can be said of the contractor is that its relation to the Government is exclusively and purely contractual and that it performs no governmental function as such. It undertakes to construct according to plans and specifications adopted by officials of the Government and its primary object is to comply with the conditions of the contract for the profit to be made thereby. The relationship of the contractor to the Federal Government, then, cannot conceivably be considered as anything other than that of an independent contractor. *Six Cos., Inc., v. DeVinney*, 2 Fed. Sup. 693.

Even where the contractor may have made purchases of materials and equipment for the Federal Government and title may have ultimately vested in the United States, such are not made by the contractor in any capacity of agent. *Boeing Airplane Company, et al. v. State Commissioner of Review and Taxation, et al.*, 113 Pac. 2nd. 110 (Supreme Court of Kansas).

The degree of supervision and control exercised by the United States under the "cost-plus-a-fixed-fee" contractor was not essentially different in principle from that exercised by the Department of Interior over Buckstaff

Bathhouse Company as determined in *Buckstaff Bathhouse Company v. McKinley*, 308 U. S. 358, and thereunder, even if the Government does exercise extensive control, it is inconceivable that the type of control which the United States may reserve over any independent contractor and which it actually does reserve over practically all parties with whom it contracts can be the basis for transformation of the contractor into an instrumentality of the Government. Cf. *Federal Compress & Warehouse Company v. McLean*, 291 U. S. 17.

The line of authorities that we believe to be determinative of the issue of agency here involved, however, is that embracing *Graves v. People of New York, ex rel O'Keefe*, 306 U. S. 466; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375; *James v. Dravo Contracting Company*, 302 U. S. 134; *Silas Mason Company, Inc. v. Tax Commission of Washington*, 302 U. S. 186; *Fidelity & Deposit Company v. Pennsylvania*, 240 U. S. 319 and *Trinityfarm Construction Company v. Grosjean*, 291 U. S. 466. Under the doctrines enunciated in those cases, it does not appear that the contractor under a "cost-plus-a-fixed fee" construction contract is himself performing such governmental functions as to be considered an instrumentality of the Government for tax exemption purposes. We submit that it was not the intention of the Government in the execution of the contracts that the contractor become an agent of the United States for any purpose, much less the limited purpose of agency for the acquisition of materials and supplies.

III.

ASSESSMENT OF TAXES ON SALES OF GASOLINE TO "COST-PLUS-A-FIXED-FEE" CONTRACTORS IS NOT AN UNCONSTITUTIONAL BURDEN ON THE UNITED STATES.

In order for the implied doctrine of inter-governmental immunity from taxation to be given effect in the case at bar, it must first of all be determined that the contractors are agents of the Government and that in such capacity the incidence of the tax is upon them as a direct and immediate burden upon the performance of a governmental function.

Even if the contractors in the case at bar are instrumentalities of the Government, we believe that the burden, if any, is consequential and remote and is not direct and immediate.

Since *Educational Films Corporation of America v. Ward*, 282 U. S. 379, the trend has been to restrict the application of the doctrine of inter-governmental immunity from taxation rather than to extend the application of the doctrine. The decisions relied upon by the defendants below in *Panhandle Oil Company v. State of Mississippi, ex rel Knox*, 277 U. S. 18, and *Graves v. Texas Company*, 298 U. S. 393, have in recent years been so distinguished and so limited in their effect by subsequent opinions as to furnish, in our opinion, no authority for the issues here presented. The sales made in those cases were unquestionably directly to the Federal Government itself for direct use of the products sold in acknowledged governmental functions. We believe that the dissenting opinion of Mr. Justice

Holmes in the *Panhandle Oil Company case, supra,* clearly expresses what is conceded to be the law today.

We suggest that the more recent decisions in *Graves v. People of the State of New York, ex rel O'Keefe, supra; Trinityfarm Construction Company v. Grosjean, supra; James v. Dravo Contracting Company, supra,* and *Silas Mason Company, Inc. v. Tax Commission of Washington, supra,* are finally determinative of the doctrine of immunity in the case at bar and that thereunder, there does not appear to be doubt that the burden, if any, is consequential and remote and, therefore, is valid.

IV.

ATTEMPT TO EXTEND THE BENEFITS OF THE DOCTRINE OF GOVERNMENTAL IMMUNTY FROM TAXATION TO PROFIT CONTRACTORS IS IN VIOLATION OF THE RESERVED CONSTITUTIONAL RIGHTS OF THE STATES TO LAY NON-DISCRIMINATORY TAXES.

The powers of the states to lay non-discriminatory taxes are reserved by them under the Tenth Amendment to the Constitution of the United States. It has been many times said and has been well recognized in our jurisprudence, both Federal and state, that in the encroachment of one government upon the other each must of necessity bear a part of the tax burden the other lays. This is because of the overlapping of jurisdiction, territorially and otherwise, which forms an integral and inherent part of our governmental system. Goverment cannot exist with-

out taxation and the safety of our nation does not require the destruction of the states and their taxing systems.

It is often difficult to determine whether a tax imposed by a state does in effect invade the domain of the Federal Government or interfere with the latter's operations to such an extent as to render it unwarranted. A tax which only remotely affects the efficient exercise of a federal power cannot for that reason alone be inhibited by the Constitution because it must be recognized that states must each be coexistent with the Federal Government and that neither may destroy the other. Hence, a practical construction must be placed upon the Constitution and its limitations and implied prohibitions should not be extended so far as to destroy the necessary powers of the state. *Railroad Company v. Peniston, 18 Wall. 5.* What is being sought here is an obvious and deliberate extension of the doctrine of immunity to private industry in the very teeth of the refusal of Congress to sanction such a program. This attempted expansion of the benefits of the doctrine is no less than an attempt to transcend the imposed constitutional limits on the power of the Federal Government in violation of the reserved sovereign rights of the states within the views expressed in *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 945.

The Constitution of the United States and the laws of the State of Alabama do not require the construction sought to be placed thereupon by the defendants below and if such construction does prevail it may very well be that many if not all of the privilege taxes now constitutionally imposed by the states will become taxes unlawfully

imposed upon an agent or instrumentality of the Federal Government because the taxpayer might at some moment have transacted some business with the Federal Government.

We submit that the taxing system of the states cannot and should not be allowed to crumble and disintegrate by an extension of the implied doctrine of immunity.

CONCLUSION.

We respectfully submit that the "cost-plus-a-fixed-fee" contractors are neither agents nor instrumentalities of the Federal Government, that the assessment of taxes in the case at bar is not a direct and immediate or unconstitutional burden on the United States and that the attempt to extend the doctrine of inter-governmental immunity from taxation to private business is in violation of the rights reserved by the states in the Tenth Amendment to the Constitution of the United States.

Respecfully submitted,

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AMICI CURIAE.